Mr. Sergeant's professional success was of course accompanied by its usual reward, and his heart and his purse were open to every call of philanthropy and charity, and his gifts must have been to an extent at the time, and even yet, unknown to us. He in fact met every appeal promptly, cheerfully and generously.

Mr. Sergeant's moral worth and rectitude were of an exalted character. He was a man of truth in the highest sense of the term. But he was more,—he was an humble, pious Christian, and his religious faith he applied to his every-day duties; to use his own language, when referring to such matters:—"In such matters, however, as I have often remarked to you, our judgment is feeble and imperfect. We can see but a little way, and that indistinctly. A conscientious effort to do our duty, with a disposition at all times submissive to Him, who rules the universe, and a continual sense of his presence, afford the best security for good conduct and the tranquillity it inspires."

RECENT AMERICAN DECISIONS.

Circuit Court of the United States for the Third Circuit. October Sessions, 1839.

SAMUEL MILLER, JUNIOR, *vs.* ARCHIBALD McELROY.[1]

1. Whether an author who gives his work to the public, by printing and publishing it in a newspaper, not protected by any copy-right, can have such a right in the same work by afterwards publishing it in a different form, as in a volume or book.—*Qu.*

2. Whether the deposite of a title page in the clerk's office, when the work it was intended for was not then printed, nor written, nor the manuscript prepared for printing and publication, although the notes or materials from which the work or

[1] The editors of the Law. Reg. are indebted to Wm. H. Crabbe, Esq., of the Philadelphia Bar, for the report of this case.

book was to be, and afterwards was composed, were then in the hands of the author, will entitle him to the copy-right of the work so afterwards prepared and composed.—*Qu.*

3. If the right exists under the circumstances stated in the first and second queries, then, whether one can be charged with an infringement of this right if he has, in fact, never seen or copied from the book so entered and secured, or in any manner used it in his publication, but has reprinted the whole from a public newspaper, unprotected by copy-right, in which he found it, and where the author himself had published it.—*Qu.*

4. Whether the fact of it being stated in some of the newspapers publishing as aforesaid, that the author had secured a copy-right, can in any way help him.—*Qu.*

5. Where there is a reasonable doubt as to the existence of a copy-right, an injunction will not be granted to stay its infringement.

This was a motion for an injunction in a copy-right case.

The complainant's bill alleged that a certain action of *quo warranto* was tried in March and April, 1839, in the Supreme Court of Pennsylvania, at Philadelphia, that complainant took notes of the proceedings therein, and subsequently prepared a full and authentic report of the case, containing the speeches of counsel, the testimony, the charge to the jury, &c., together with original explanatory notes and remarks; that he afterwards published this report, in one volume, under the title "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, at the suggestion of James Todd and others, *vs.* Ashbel Green and others;" that said work was prepared chiefly from his own notes, though partly from other materials, and that he was the author and proprietor thereof, within the intention and meaning of the Act of Congress, that he caused a printed copy of the title, in the words, "Report of the Presbyterian Church case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others, by a member of the Philadelphia Bar," to be duly deposited in conformity with said act, and had complied with all the other requisites thereof; that respondent had, since the publication of complainant's work, caused to be published and sold in Philadelphia a work under the title of "The Case of the General Assembly of the Presbyterian Church in the United States of

America, before the Supreme Court of the Commonwealth of Pennsylvania, impartially reported by disinterested stenographers; including all the proceedings, testimony and arguments at *nisi prius*, and before the court in *banc*, with the charge of Judge Rogers, the verdict of the jury, and the opinion of Chief Justice Gibson," and that certain large parts of said work, then referred to, were nearly like the corresponding parts of complainant's work—so nearly like that respondent must have copied them, more or less literally, from the latter; that a great portion of respondent's work was printed before complainant had published his, but that the parts mentioned were copied from complainant's work, before the whole of it had been printed and published, to wit, either from a paper book prepared for the use of the counsel in the case by complainant, and printed after he had secured his copy-right, but never published, or from a certain weekly newspaper—"The Presbyterian"—published in Philadelphia, in which, by the mere verbal permission of complainant, certain parts of his work were published, after he had secured his copy-right, but not without public notice of said copy-right in said newspaper, or else from some other copy of the work unknown to complainant; and the bill prayed for an injunction, delivery and account, waiving the benefit of the penalty inflicted by the Act of Congress.

The respondent answered that he had published and sold a work entitled as in the bill alleged, but that it was not true that any part of said work was copied from the alleged work of complainant; that the parts mentioned in the bill were not so copied, but were wholly and entirely furnished to respondent by Isaac E. Lamborn, a stenographer, who had no connexion with complainant, and was not employed or paid by him; that complainant did not duly deposite a copy of the title-page of his alleged work, but that the paper deposited was a copy of a title page differing from that of said work, and that no copy of the work of which the title page was deposited was ever so deposited; and that complainant's work was not made use of in the preparation of the respondent's.

A general replication was filed, and the complainant moved for an injunction, &c., in accordance with the prayer of the bill. The

motion was argued on the 17th September, 1839, before Judge HOPKINSON, by

Miller, for Complainant, and

Perkins, for Respondent.

Miller, for the motion.—Does the bill show a good ground for an injunction? Such a report is undoubtedly a proper subject for copy-right. Blackstone says that sentiment and language are the subject of copy-right. The material of this work probably could not be claimed exclusively by complainant, but when he has applied thereto his learning, talents, skill and industry, no one has a right to use the product. *Wyatt* v. *Barnard*, 3 Ves. & B. 78; Eden, 329, 323. *Burfield* v. *Nicholson*, 2 Sim. & St. 1. The bill shows that complainant secured his right, and that the respondent has violated it. These essential facts shown, we are entitled to the injunction.

Perkins, against the motion.—The party asking the interposition of this high power must show that he has complied with all the provisions of the law. *Ewer* v. *Coxe*, 4 W. C. C. R. 487; Godson on patents, 366; Act of 3d February, 1831, § 4 (4 Story's Laws, 22, 21). The title page of the book published has never been deposited up to this time. The bill itself shows that the title deposited was "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others. By a member of the Philadelphia Bar," while the title of the book published was simply "Report of the Presbyterian Church Case: the Commonwealth of Pennsylvania, at the suggestion of James Todd and others, *vs.* Ashbel Green and others." Again, the bill is argumentative, asserting the words to be so nearly alike that they must have been copied, and not positively asserting that one was copied from the other. It is natural and reasonable that, being reports of the same transactions, they should be nearly alike; they ought to be so. It is an analogous case to that of interest tables, which every one must calculate for himself, but which must all agree. As to the paper books, they were not used in the preparation of respondent's report; but if they were they could not be subjects of copy-right, being part of the records

of the Supreme Court of Pennsylvania. *Dodsley* v. *Kinnersley*, Ambl. 403; *Wheaton* v. *Peters*, 8 Pet. 654. Where, by the conduct of the party, as by allowing others to publish his work, the state of things he complains of has been created the injunction will not issue. *Saunders* v. *Smith*, Am. Jurist, vol. 21, No. 41, pp. 221, 227. This complainant published, or allowed others to publish his work in the Presbyterian.

On the 23d September, 1839, Judge HOPKINSON delivered the following opinion in the case:

An action was tried a few months since in the courts of Pennsylvania, in which that Commonwealth, at the suggestion of James Todd and others, was plaintiff, and Ashbel Green and others defendants. From the nature of the controversy, the importance of the judgment that might be rendered, and the number and respectability of the persons interested in it, the trial produced an extraordinary excitement. The parties were respectively desirous to have a report of the trial for publication; and persons were accordingly employed, by each of them, to make a report of the proceedings before the court. These reports were published a short time since, each in an octavo volume, within two or three days of each other. If both are true and faithful, they cannot substantially differ from each other, as they both profess to give an account of the same proceedings. The report made on the part of the defendants was prepared by this complainant; the other was made, or published, by Archibald McElroy. The bill, among other things, prays that an injunction may issue from this court against the respondent, to restrain him from printing, publishing, selling, or otherwise disposing of the parts of his said book, which complainant charges to be for the most part very nearly in the same words, or of the same purport and effect as certain parts of the work or report printed and published by the complainant, who alleges it to be absolutely impossible that the said parts of the work so published by the respondent should be so nearly in the same words, or of the same purport and effect, as the said parts of the complainant's work, if the former had been prepared from original

notes taken by the said respondent, and had not been copied more or less literally from the complainant. The affidavit which accompanies the bill repeats and reaffirms these allegations.

On the 23d day of last March the complainant entered in the clerk's office of the District Court of the United States the title of his book, as follows: "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others. By a member of the Philadelphia Bar." It is agreed that the verdict of the jury was rendered on the 26th March. At the time when this title-page was deposited with the clerk the book was not printed, nor was the manuscript arranged or prepared for printing and publication, although the materials were in the hands of the author and reporter, the complainant. The publication was not made for several months after, as has been already stated.

In addition to these facts it appeared, further, that some months before the publication of the complainant's book he had printed several copies of certain parts of it as a paper book, for the use of the counsel who argued the motion for a new trial, and of the judges before whom that motion was argued, but that these copies were printed after the complainant had deposited the title of his book in the clerk's office; that these paper books were never published or exposed to sale by the complainant, or by any one on his account, or by his permission or order, but that such publication and sale were by him strictly prohibited. It is also stated or agreed that the whole of the contents of the volume or book of the complainant, with those parts of it now charged to have been taken from him by the respondent, were printed and published in a certain weekly paper, published in the city of Philadelphia, by William S. Martien, entitled "The Presbyterian," in eleven successive numbers, by the verbal permission of the complainant; which publication was also made after the title of the book had been deposited in the clerk's office, but a considerable time before the printing and publishing of the book. It is alleged that the parts of the work of the respondent complained of were taken from these paper books or newspapers; but no allegation is made that any parts of the said book or report of

the respondent were taken or copied from the book of the complainant, the title-page of which he had deposited in the clerk's office; nor that the said book was in any manner used by the respondent in making his report. Indeed, it could not be so, as the two books were published almost simultaneously. The complainant avers distinctly that the parts of the respondent's report which are claimed to be the work and property of the complainant were taken from certain paper books he had printed for the purposes mentioned, and from certain public newspapers in which his report had been published with his consent.

Putting, for the present, the paper books, printed for a special purpose, and, in some degree, confidentially, out of the case, the publication, by the complainant, of his work in a newspaper, for which there was no copy-right, circulated, probably, in every State of the Union, and the property of every one who paid for it, presents some very important and novel questions. I presume they are so, as neither the industry of the counsel concerned in this argument nor my own research, has found any judicial answer to them. They are:

Whether an author who gives his work to the public, by printing and publishing it in a public newspaper, not protected by any copy-right, can have such a right in the same work by afterwards publishing it in a different form, as in a volume or book?

Whether an author, by depositing a title-page in the clerk's office, when the work it is intended for is not then printed, nor written, nor the manuscript prepared for printing and publication, although the notes or materials from which the work or book is to be, and, afterwards, actually is, composed, are then in the hands of the author, may have a copy-right of the work so afterwards prepared and composed, by affixing it to the title-page so deposited?

Supposing the two previous questions to be answered affirmatively, that the book so secured by depositing the title-page as aforesaid is protected from violation, and that no man can reprint and publish it, or any part of it, without the permission of the author, yet the question remains whether one can be charged with an infringement upon this right. if he has, in fact, never seen or copied from the

book so entered and secured, or in any manner used it in his publication, but has reprinted the same matter, in part or whole, from a public newspaper in which he found it, where the author had himself published it, and in which paper neither the author nor any other had any copy-right? and,

Whether the notice, given in some of the papers of the copy-right, as stated by the affidavit, can help the complainant?

These are grave questions not to be decided on a preliminary inquiry and argument, but to be left, without prejudice, to the full and final hearing of the case. If, on that hearing, the complainant shall sustain his case and complaint, he will recover a judgment to compensate him for the wrong he has suffered, and I have no reason to believe the respondent will not be able to answer it. In the case of *Ogle* v. *Ege*, 4 Wash. C. C. R. 584, Judge WASHINGTON said, on a prayer for an injunction, that if there appears a reasonable doubt as to the plaintiff's right, or the validity of his patent, the court will require him to try his title at law.

Other questions were raised on this argument, such as that the title of the book is not the same as that deposited in the office, and that the affidavit is not direct but argumentative. These it is unnecessary for me to notice at this time. It is my desire and intention to keep myself as free and open upon all the points that may hereafter be presented to my judgment in this case. Were I to grant the injunction I should decide the questions I have stated, as well as others, affirmatively for the complainant. This I am not now prepared to do, whatever may be my opinion hereafter. The parties will come to the final hearing on their respective rights without a prejudication of any one of them.

The injunction is refused.